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No. 80-361

In the Supreme Court of the United States

EDWIN S. MALMED, STANLEY L. KUBACKI, GREGORY G. LAGAKOS, JOSEPH T. MURPHY, and JAMES L. STERN,

Petitioners

v.

RICHARD L. THORNBURG, Individually and as Governor of Pennsylvania, ETHEL D. ALLEN, Individually and as Secretary of the Commonwealth of Pennsylvania, ROBERT E. CASEY, Individually and as Treasurer of the Commonwealth of Pennsylvania, and ALEXANDER F. BARBIERI, Individually and as Pennsylvania Court Administrator,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit at No. 79-2467.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the mandatory retirement of judges at age seventy serves any legitimate state purpose and, therefore, complies with the equal protection and due process clauses of the Constitution.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, Respondents submit this brief in opposition to Petitioner's Petition for a Writ of Certiorari.

I. COUNTER-STATEMENT OF THE CASE

A. Procedural History

This action was commenced by five judges of the Court of Common Pleas of Philadelphia County against the Governor, Secretary of the Commonwealth, Treasurer and Court Administrator of Pennsylvania seeking declaratory and equitable relief on the ground that Article V, Section 16 (b) of the Pennsylvania Constitution, providing for the mandatory retirement of judges at age 70, is unconstitutional in violation of the equal protection and due process clauses of the fourteenth amendment. No class action was filed by the plaintiffs or certified by the District Court.

The action was tried without a jury on April 17, 18 and 20, 1979. On September 21, 1979, the District Court handed down its opinion and order, *Malmed v. Thornburgh,* 478 F. Supp. 998 (E.D. Pa. 1979), holding that the mandatory retirement provision of Article V, §16 (b) conflicts with both the due process and equal protection clauses of the fourteenth amendment, declaring the provision null and void and enjoining enforcement of the provision and its enabling statutes "as to any judge of the Court of Common Pleas." 478 F. Supp. at 1016.

Defendants appealed to the Court of Appeals for the Third Circuit which, by opinion and order dated May 13,

1980, reversed the order of the District Court, holding that Article V, §16(b) does not violate the fourteenth amendment. Plaintiffs subsequently sought rehearing en banc, which was denied by order dated June 10, 1980.

Plaintiffs (hereinafter "petitioners") filed their petition for certiorari on September 3, 1980. This brief is filed on behalf of all respondents in opposition to that motion.

B. Statement of the Facts

In 1967, a special constitutional convention was convened to consider amendments to the Pennsylvania Constitution. As a result of the deliberations of that convention, a new Judiciary Article was adopted[1] on April 23, 1968. Included in that new Judiciary Article was Article V, §16(b), the provision at issue in this case, which provides in relevant part: "Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years."

This article was the product of extensive deliberations by the Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention. In discussing the merits of the article, the Committee noted that "[a]bout one-half of the states require judges to retire at a fixed age, with seventy years being

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[1] The convention also recommended changes in other areas, most of which were adopted.

the most common."[2] The Judiciary Subcommittee went on to summarize the arguments favoring a mandatory retirement provision, stating that a mandatory retirement policy:

> substantially increases judicial manpower when a plan for part-time post-retirement service exists. By continually bringing in younger judges while retaining the part-time services of willing and able retired judges, a system of mandatory retirement plus post-retirement service helps solve the pressing problem of court congestion and delay. As mentioned previously, Pennsylvania already has provided for voluntary post-retirement service.
>
> eliminates unpleasantness of removing aged and disabled judges on an individual selective basis. Mandatory retirement is more impersonal than individual removal: everyone is treated alike. The difficulty and unpleasantness of determining which judges are senile and which are not is largely avoided.
>
> prevent[s] harm by few senile judges [which] more than offsets loss of judges who retain full powers past normal age. Besides, the services of able retired judges may be secured by a provision for post-retirement service.
>
> corresponds with current trend towards mandatory retirement in other public and private em-

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[2] Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention, Reference Manual No. 5, at 202 (1968) (hereinafter "Reference Manual No. 5") (citing *Summaries of Judicial Salaries and Retirement Plans*, 49 J. Am. Jud. Socy. 168 (Feb. 1966)). This document was submitted by defendants and received as an exhibit at trial.

> ployments. There appears to be no good reason why judges should be treated differently from other public officials, teachers, executives, and other professional people who are subject to compulsory retirement.

Reference Manual No. 5, *supra* at 203-204. The Subcommitte also reported that the American Bar Association, the Pennsylvania Bar Association and National Municipal League had each advocated some form of mandatory retirement for judges.[3]

Based presumably[4] in large part on the discussion set forth in Reference Manual No. 5, the convention adopted the mandatory retirement language drafted by the Judiciary Subcommittee. Subsequently, when ratified by popular vote on April 23, 1968, that language became Article V, §16 of the Pennsylvania Constitution.

While Article V, §16(b) requires retirement of judges at age 70, Article V, §16(c) provides that "a former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by rule of the Supreme Court" (39a). Under the implementing legislation, the compensation for judges assigned under §16(b) is $75.00 per day.[5]

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[3] Reference Manual No. 5, *supra* at 203.

[4] There was no debate and only little discussion of the mandatory retirement provisions during the considerations on the convention floor. See Debates of the Pennsylvania Constitutional Convention of 1967-68 (1968). See also *Malmed v. Thornburgh*, F.2d , n. 10 (3d Cir. 1980) (6a n. 10).

[5] The annual salary of active judges is $45,000. The maximum amount that a retired judge can earn is approximately $30,500.

According to the evidence, every judge who has reached the age of 70 while in office, and who has requested assignment to post-retirement service has been accepted and so served.[6] There was also testimony that many of those judges are as productive as active judges and that their work is essential to the effective operation of the judicial system in Pennsylvania. Finally, plaintiffs also presented evidence that physical health, and not age, is the most critical factor affecting the competence of professional persons, such as doctors, lawyers and judges.

At trial, petitioners contended, and the District Court held, that the primary purpose of §16(b) was the removal of unfit judges from the bench. While conceding that this is a legitimate state purpose, the District Court found that the provision for mandatory retirement at age seventy was overly broad, removing many judges who are fit to serve, and that, because less sweeping means were available to accomplish that end, Article V, §16(b) created an irrebuttable presumption violative of the due process clause of the fourteenth amendment. The trial court also held that the constitutional provision violated equal protection by allowing retired judges to continue to render the same services as active judges while paying them less money to do so.

On appeal, the Court of Appeals rejected the District Court's holding that the primary purpose of mandatory re-

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[6] This fact was stipulated by the parties. After filing their appeal, respondents sought a remand in order to file a motion for a new trial based in part on the allegation that that stipulation was inaccurate. The Court of Appeals denied the request to remand the case.

tirement was to remove unfit judges. Rather, focusing on the history of the Constitutional Convention, specifically the reports of the Judiciary Subcommittee of the Preparatory Committee,[7] the Court of Appeals found that the provision was intended to further and did, in fact, further four separate and legitimate state purposes, including the reduction of court congestion, the elimination of the unpleasantness of selectively removing aged and disabled judges, the prevention of harm by senile judges and conformity with the general trend toward mandatory retirement at seventy in other public and private employment. Accordingly, the Court of Appeals rejected the District Court's equal protection analysis.

The Court of Appeals found that same error fatal to the lower court's due process analysis. First, the Court rejected the trial court's use of the "less restrictive alternative" test, holding instead, that there need only be a raional basis for the state's classification. The court then reaffirmed the rational relationship between mandatory retirement and the four purposes set out in Reference Report No. 5.

Having rejected both bases for the District Court's holding, the Court of Appeals found the constitutional mandatory retirement provision to be constitutional. Accordingly, the court reversed the orders of the trial court.

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[7] Reference Manual No. 5, *supra*. See p. 4 *supra*.

II. REASONS FOR DENYING THE WRIT

A. The Courts of Appeals Which Have Considered the Question Are in Agreement That the Mandatory Retirement of Judges at Age Seventy Is Constitutional

Petitioners concede that the only other Court of Appeals which has considered the question has, like the Third Circuit, held that the mandatory retirement of judges at age seventy violates neither the equal protection nor the due process clauses of the fourteenth amendment. *Trafalet v. Thompson,* 594 F.2d 623 (7th Cir.), *cert. denied,* U.S. , 100 S.Ct. 219 (1979). Moreover, petitioners apparently pose no challenge to the holding of that court. Rather, they contend that *Trafalet* is distinguishable because in that case there was no evidence that a substantial number of retired judges continued to perform judicial functions or that retired judges received lower salaries for rendering services identical to those performed by younger judges.

By this contention, petitioners misconstrue the thrust of their own claim. Petitioners do not challenge the constitutional provision allowing the assignment of retired judges. Nor did they challenge the statute which implements that provision by providing compensation for those retired judges choosing to accept such assignment. Rather, they seek only to enjoin the separate constitutional section §16(b) which provides for mandatory retirement. Thus,

according to petitioners, it is rational to mandate retirement in one state and one Circuit, but not in another. This result is obviously unacceptable.

Rather, as the Third Circuit properly recognized, the sole question before a federal court reviewing a state constitutional provision under the equal protection (15a) and due process clauses (24a) is whether that provision is rationally related to the accomplishment of *any* legitimate state objective. Obviously, if mandatory retirement is rationally related to legitimate state objectives in one state, it is also related to those objectives in another. Accordingly, petitioners' attempt to distinguish the holding of the Seventh Circuit in *Trafalet* from that in this case is without merit. There is, therefore, agreement between the Circuits on the issue raised in this case and no need for this Court to review this case.

B. The Court of Appeals Properly Applied the Irrebuttable Presumption Doctrine to the Facts of This Case

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Petitioners contend that the Court of Appeals erred in failing to follow this Court's holding in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). According to petitioners, that case sets forth a test requiring that a statutory classification be both rational and the least restrictive means of accomplishing a proper state purpose.

In refusing to apply that test, the Court of Appeals apparently recognized, as has this Court, that an extension of the *LaFleur* holding would turn the irrebuttable pre-

sumption doctrine into "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." *Weinberger v. Salfi,* 422 U.S. 749, 772 (1975).

Thus, because no suspect class or fundamental interest is implicated in this case, the Court of Appeals properly applied the "rational relationship test" (21a-23a). See *Weinberger v. Salfi, supra* at 777. To do otherwise would have had the effect of elevating age to the category of "suspect classifications",[8] an analysis this Court has repeatedly rejected. *Vance v. Bradley,* 440 U.S. 93 (1979); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976) (per curiam).

Having determined that the mandatory retirement of judges at age seventy need only serve a rational state interest, the Court of Appeals then found that, in fact, four such interests were served. See pp. 6-7 *supra.*

Accordingly, the Court of Appeals properly applied the holdings of this Court and its holding need not be reviewed.

C. The Court of Appeals Correctly Held That Mandatory Retirement Furthers Legitimate State Aims and Is, Therefore, Constitutional

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In holding that the primary purpose of Article V, §16(b) is to remove unfit judges and that, in fact, man-

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[8] As the Court of Appeals noted application of the *LaFleur* test to classifications based on age would place a wide range of state legislation in question (23a).

datory retirement "is merely a thinly veiled scheme for acquiring cheap judicial labor" (63a), the District Court committed two basic errors, both of which were properly rectified by the Court of Appeals. First, the District Court totally ignored the legislative history of the constitutional provision at issue and the express statements of purpose contained therein. As is noted above, the Court of Appeals read that history and correctly found four separate state interests supporting mandatory retirement,[9] each of which is rational and sufficiently furthered by the constitutional provision.

As importantly, in describing Pennsylvania's mandatory retirement system as a "thinly veiled scheme for acquiring cheap judicial labor" (63a), and relying on that finding to hold the entire system unconstitutional, the District Court improperly misinterpreted petitioners' claim. The acquisition of "cheap judicial labor" is neither a purpose nor an effect of the constitutional provision for mandatory retirement, Article V, §16(b), which petitioners challenge in this case. Nor is that the purpose or effect of the provision allowing the assignment of retired judges, Article V, §16(c). Rather, the lower rates of compensation for senior judges results directly and solely from implementing legislation. 42 Pa. C.S.A. §3154(c) (70a). Nothing in the challenged constitutional provision requires

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[9] (13a-14a). Specifically, the Court of Appeals found that mandatory retirement furthered the state's interest in reducing court congestion, the elimination of the unpleasantness of selectively removing aged and disabled judges, the prevention of harm by senile judges and conformity with the general trend mandatory retirement in other public and private employment. See Reference Manual No. 5, supra at 203.

or even suggests that result. Thus, while the district court might have stricken that implementing legislation as "a thinly veiled scheme for acquiring cheap judicial labor,"[10] 478 F. Supp. at 1015, that legislation provides no basis for the relief requested by petitioners, both here and in the lower courts—an injunction against their mandatory retirement. Accordingly, the Court of Appeals was correct in holding that this analysis was irrelevant to the constitutionality of mandatory retirement.

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[10] As the Court of Appeals properly noted, petitioners did not raise this issue in the District Court, but if they had there is no doubt that the difference in pay was rationally based. F.2d at n. 14 (15a n. 15).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner has presented no issues worthy of discretionary review by this Court and that, therefore, his Petition should be denied.

Respectfully submitted,

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